

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

EVERGREEN TRAILS, INC. d/b/a  
GRAYLINE OF SEATTLE

Employer

and

Case 19-RC-13848

UNITED TRANSPORTATION UNION,  
LOCAL NO. 324, AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a voting group appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All part-time drivers employed by the Employer at its Seattle, Washington facility, excluding all regular drivers, all transit drivers, all other employees currently represented by a labor organization, all other employees, guards and supervisors as defined in the Act.

## FACTS

The Employer is engaged in the operation of a charter bus/tour bus operation out of its Seattle Washington facility. The petitioner currently represents the Employer's "full-time" drivers, defined as all those drivers who in the preceding November 1 – October 31 year worked at least 1200 hours and did not elect to remain "part-time." The Petitioner also represents certain non-drivers.

Petitioner seeks to represent the Employer's part-time drivers, i.e., all drivers not deemed full-time, as part of the existing unit. The Employer agrees with the voting group description and the self-determination election. The only issues separating the parties concern the election. The Employer contends its operation is "seasonal", that the seasonal peak has passed for this year, and that the election should be conducted next June, manually. The Petitioner contends that the workforce is "cyclical", and that the election should be conducted as soon as possible, by mail.

The Employer has a complement of about 53 full-time drivers, represented by the Union. In addition, it has about 30-35 "year 'round part-time" drivers, currently unrepresented. Finally, it has perhaps 90 "part-time" drivers on its roster. Employment of the part-timers<sup>1</sup> varies from a low of 35 in the slowest time of the year, to a peak of about 100 – 110 in the busiest time. These numbers are intended to represent the number of employees who would actually work at least 8 hours in any given week. (There could be additional employees who worked less than that number in a given week.)

For the part-timers, there is generally no scheduled work in the traditional sense. In the off season, if the full-timers pass up certain regular "bid work", the regular part-timers can bid on the remainder. Beyond that, dispatching is done on a daily basis, with one's hours for tomorrow usually known by late today, but sometimes not that soon. Some runs may be overnight, or last several days, but the majority are much shorter. There is no formal priority system. Drivers make their availability known – they are not required to maintain a certain minimum availability, or to take any run they did not volunteer for – and work is assigned by "operations", apparently as they deem fit.

Once a driver is hired, the name is maintained on a roster. The roster is purged in November of anyone who has not worked any hours in the preceding 60 days, but the names are still maintained on the payroll (whatever that distinction may mean). Employees are considered to remain employees, if they have not formally quit or been discharged, because the Employer needs to maintain a floating pool of drivers who have been trained and cleared, so they can be used on a moment's notice, without the necessity of rehiring or other repetitive paperwork.

The non-year-round part-timers tend to be school bus drivers, teachers and students, who are generally available during the summer months, and less, or un-available during the rest of the year. However, they can indicate their availability at other times of the year, such as school vacations. While the workload is less during those periods than during the summer, the full-time drivers may be taking their vacations during those periods and thereby cause an increase in part-time runs.

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<sup>1</sup> I will use the term "part-time" to denote collectively both the regular and other part-time drivers. I will use the terms "full-time" and "regular" driver interchangeably.

About 125 part-timers might appear on the roster at the start of the summer peak. Of those, about 20 – 40%<sup>2</sup> would be new to the Employer; the balance would be continuations. New employees are hired and trained starting in February, to be ready for the busy season. Training time is paid.

The record contains a compilation by the Employer that shows with specificity the number of employees who worked at least 8 hours in a given week, week by week, for the period June through October, 1998 and for June-July, 1999. Unfortunately a compilation was not done for the rest of the year, something that would have made the record considerably shorter and more accurate. Instead, we were left with pages of the testimonial approximations by the parties' witnesses. The Employer's Human Resources witness, who compiled the chart, did not have first-hand knowledge of the staffing levels for the rest of the year.<sup>3</sup> The Union's witnesses were long-time employees who testified on the basis of their experience and their access to Employer records. I deem their testimony more reliable, but in reality the parties' estimates are not that far apart.

In words, the employment peak is about 100 part-time drivers who worked 8+ hours in any week from June 1 through August 30. Thereafter, employment tapers off to a low of about 35 in November. There is some pick-up of work during December for certain Christmas tours, but the record never reflects the numbers. In January and February, the "ski season" increases work. On the four busiest days of the week, there would be, according to the Union, about 60-70 part-timers who would work some hours in the four-day period; the Employer's testimony was that on any given day there might be 30 part-timers working, of whom 20 or so would be year 'round part-time and 10 seasonal part-time.<sup>4</sup> After ski season, employment drops down again to about 30-35 until it starts picking up again quickly in May for the start of the summer peak again.

Graphically, the work pattern looks something like that set forth in Attachment A.<sup>5</sup>

These facts can be gleaned from the chart and the record:

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<sup>2</sup> The estimates varied on the record; the Employer's estimates were within this range.

<sup>3</sup> She claimed there would be a precipitous drop-off in late August, but gave no basis for her assertion, which does not comport with the 1998 experience. The 1999 figures on the chart generally paralleled the 1998 figures, except the levels were about 10 less in '99.

<sup>4</sup> These numbers are not necessarily in conflict, since the 30 employees that work one particular day would not necessarily be the 30 that would work the next; in fact, there was testimony that unspecified regulations would preclude the same person taking a Friday night run and a Saturday morning run.

<sup>5</sup> This chart is a *rough* approximation. It conflates, where figures for both years are available, the two years. It relies on the Employer's compilation, for the months covered by same. I rely more heavily on the Union's witness for other periods, than on the Human Resources representative, because their information was far more direct or first-hand. I also note the similarity for 1998 and 1999 figures for June 1-July 15, and extrapolate the 1998 figures for 1999 beyond July 15. Finally, there are certain apples/oranges, or at least red delicious/yellow delicious, characteristics to the ski figures, since the Union and Employer witnesses were not always estimating using exactly the same parameters. As noted, specificity is lacking because the Employer's exhibit is limited to a portion of the year, and because the balance of the year consists of verbal estimates other than the facts.

- a. At all times there are 30-35 year 'round part-timers working.
- b. The peak number of part-timers working some portion of a given week is about 100.
- c. In 7 months, there are at least 60 part-timers employed per week.
- d. The roster of part-timers carries over continuously, with no formal action at the end of the summer peak by either employee or Employer. Once on the list, an employee may work whenever he and work are mutually available. There is no need to re-apply each season.
- e. Employees often return when mutually convenient, between summer seasons.
- f. About 60%-80% of the workers on the roster at the start of summer are carryovers from the previous summer.<sup>6 7</sup>

## **LAW**

The Board law may, when the employer is “seasonal”, delay an election until the seasonal peak. This policy assures that the large number of employees working only at the seasonal peak will not be disenfranchised by having the election at a slack time, when only a minority of workers might resolve the representation question. Oftentimes, the season will cause an extraordinary buildup in employment, with the likelihood of return by any one employee relatively small. On the other hand, when the employer has more than one peak,<sup>8</sup> the Board will balance the potential disenfranchisement of certain employees with the unfairness of forcing employees to wait as much as a year for an election. In such circumstances, the Board may direct an election at an early peak, or even sooner.

There are other potential methods to accommodate the conflicting negatives of delay and disenfranchisement. For example, a mail ballot could be directed; in that manner, all eligible employees, even if not physically available to vote during the polling period, would have an opportunity to vote. Similarly, the Board can develop an eligibility formula so that all employees with a long-term, continuing interest are permitted to vote, whether or not they are actually employed during the week or month in which the election happens to fall. Such a formula also eliminates individuals who by happenstance might have just been employed for the first time right before the eligibility date, and thus have no demonstrated prior history or continuity with the employer.

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<sup>6</sup> These are estimates of the Employer's witnesses.

<sup>7</sup> It also appears that the Employer will quite possibly have a large, 10-day peak – the exact size not yet known - in the end of November/beginning of December, 1999 period, during the World Trade Organization meeting in Seattle. I do not rely on this possibility for my decision, however.

<sup>8</sup> The varying employment pattern, even when totally predictable, and consisting of only two peaks, is dominated “cyclical”, not “seasonal”, by the Board.

In the instant case, it could be argued that this employer has two seasonal peaks: the larger, longer summer season, and the smaller, shorter ski season. In such case, it might be appropriate to conduct an immediate election, or one in January, 2000 at the start of the season, or even during the WTO convention.

Taking into account all of the factors recited above, notably the large number of year-round part-timers, the high "return" percentage, the lengthy retention periods for some employees,<sup>9</sup> the possibility of, and eligibility for, multiple returns throughout the year for any interested, non-year-round employee, I conclude that it would be best to order an immediate election, using an eligibility formula. That way, there need be no excessive delay in resolving the question concerning representation, and eligibility can be limited to those having an established, continuing relationship with the Employer.<sup>10</sup>

As to a formula, no party explicitly suggested one, although there was reference to a formula used with this employer, but a different union, for an election eleven years ago, following a stipulated election agreement:<sup>11</sup> all employees averaging eight hours per week during a six-week period at the start of the summer peak.

I conclude that the eligibles should include any non-regular employee who meets *any* of the following criteria and has not been terminated or quit:

- a. Worked a total of at least 3000 hours for the Employer in Seattle, including at least 8 hours in the year running from November 1, 1999, to the election date or October 31, 1999, whichever is sooner.<sup>12</sup>
- b. Worked at least 1200 hours during the period November 1, 1997 to October 31, 1998, and elected not to become a full-time employee after the 97-98 period,<sup>13</sup> and at least 24 hours during the period November 1, 1998, to the election date or October 31, 1999, whichever is sooner.
- c. Worked an average of at least 8 hours per week during the period Sunday, May 30-Saturday, August 14, 1999.

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<sup>9</sup> Some part-timers have worked for the Employer for 10 years.

<sup>10</sup> Given that many of the eligibles might not be present to vote in a manual election – it appears many are college students who may attend school at some distance, and others might not be able to leave their off-season employment on a given election day – it may well be the fairest way to conduct this election is by mail. I will leave a resolution of that issue to administrative determination following the issuance of this Decision. This was not a litigated issue during the hearing.

<sup>11</sup> Contrary to the Employer's brief, the Agency did not "decide" that the Employer was seasonal or that an election had to be held in the summer peak. The then-parties stipulated to such an election and its timing.

<sup>12</sup> The Employer has a policy of paying part-timers who have achieved 3000 "lifetime" hours at the same level as the full-time employees.

<sup>13</sup> Employees working 1200 hours during a November-October year are eligible to become full-time employees, if they elect to do so.

- d. Worked at least 200 hours during the period November 1, 1998 to October 31, 1999 or the election date, whichever is sooner.

Accordingly, if the employees vote in favor of representation, they shall be deemed to have expressed the desire to be included as part of the existing "regular driver" unit represented by Petitioner. In such case, the appropriate unit shall be:

All regular drivers, part-time drivers, mechanics, servicepersons and coach cleaners employed by the Employer at its Seattle, Washington facility; excluding all transit drivers, guards, supervisors as defined in the Act and all other employees.

There are approximately 125 eligible voters.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those who meet one of the eligibility criteria set forth above as of the election date. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by UNITED TRANSPORTATION UNION, LOCAL NO. 324.

### **LIST OF VOTERS**

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters as of the date of this Decision must be filed with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Seattle Regional Office, 2948 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, on or before September 7, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. It is requested that an update of additional eligibles, if any, be similarly furnished within 7 days of the issuance of the Notice of Election in this matter.

### **NOTICE POSTING OBLIGATIONS**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the

date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

#### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by September 13, 1999.

**DATED** at Seattle, Washington, this 30th day of August, 1999.

/s/ PAUL EGGERT

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